

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**GARY L. ARMSTRONG**

Claimant

VS.

**SEDGWICK COUNTY**

Respondent

Self-Insured

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Docket No. 166,021

**ORDER**

Claimant requests review of the Award of Administrative Law Judge John D. Clark entered in this proceeding on February 24, 1995. The Appeals Board heard oral argument in Wichita, Kansas, on June 1, 1995.

**APPEARANCES**

Claimant appeared by his attorney, James P. Johnston of Wichita, Kansas. The respondent appeared by its attorney, E. L. Lee Kinch of Wichita, Kansas. There were no other appearances.

**RECORD**

The record considered by the Appeals Board is enumerated in the Award of the Administrative Law Judge. In addition, the record includes the report of Jane Drazek, M.D., dated November 3, 1994.

**STIPULATIONS**

The stipulations of the parties are listed in the Award of the Administrative Law Judge and are adopted by the Appeals Board for this review.

**ISSUES**

The Administrative Law Judge applied the presumption of no work disability found in K.S.A. 1991 Supp. 44-510e and awarded claimant permanent partial disability benefits based upon a two percent (2%) functional impairment rating. Claimant requested the Appeals Board to review that finding. Nature and extent of disability is the sole issue now before the Appeals Board.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Administrative Law Judge should be affirmed.

Claimant worked for the respondent as a janitor. On January 7, 1992, while at work, claimant slipped and fell on a floor he was stripping and injured his back. Claimant immediately reported his accident and sought medical treatment at a local hospital emergency room.

Respondent eventually referred claimant to board certified orthopedic surgeon Robert L. Eyster, M.D., who first saw claimant in March 1992. During the course of treatment, Dr. Eyster diagnosed low back strain and prescribed cortisone injections and pain medication. Dr. Eyster believes claimant experienced muscular strain as a result of his injury, but has not sustained permanent impairment and does not require work restrictions.

At respondent's request, claimant was evaluated by board certified orthopedic surgeon Robert A. Rawcliffe, M.D., in May 1993. Dr. Rawcliffe believes claimant's accident caused a lumbosacral sprain or strain, but that claimant has not sustained permanent impairment as a result of the injury. The doctor found no reason to limit claimant's work activities, although he did believe claimant exhibited psychogenic overlay and needed treatment for depression.

In April 1994, claimant was evaluated by Lawrence R. Blaty, M.D., who is board certified in physical medicine and rehabilitation. Dr. Blaty diagnosed claimant's condition as chronic lumbar sprain. Because of the loss of range of motion objectively exhibited, Dr. Blaty believes claimant has sustained a nine percent (9%) functional impairment under the AMA Guides and also needs permanent restrictions to protect his back.

The Administrative Law Judge ordered an independent medical evaluation by Wichita physiatrist Jane Drazek, M.D. Dr. Drazek evaluated claimant in November 1994 and noted the following in her report:

"With the exception of very minimal loss of the lumbar extension, no significant abnormality is noted as relates to the patient's back injury  
...

With normal strength and range of motion of the back, I do not feel that the patient has sustained any permanent impairment to his back on the basis of his lumbar strain. By the patient's history, he states that he believes that he has continued to improve. I would, however,

recommend that he avoid activities including lifting greater than 30-35 pounds, repetitive bending, kneeling, stooping and twisting.”

The Appeals Board agrees with the analysis of the Administrative Law Judge that claimant has sustained some permanent impairment as a result of his injury and adopts the conclusion of the Administrative Law Judge that the functional impairment is minimal and approximately two percent (2%).

Claimant contends he has sustained significant work disability as a result of this injury. As did the Administrative Law Judge, the Appeals Board disagrees. After his accident claimant returned to work for respondent earning more per hour than he was earning at the time he was injured. The Appeals Board finds claimant has returned to a position paying comparable wage and the presumption of no work disability contained in K.S.A. 1991 Supp. 44-510e is applicable. The statute provides:

“The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except in any event the extent of permanent partial general disability shall not be less than [the] percentage of impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.”

The Appeals Board finds the presumption of no work disability has not been rebutted and claimant is entitled to benefits based upon his functional impairment. No evidence has been presented that indicates claimant cannot indefinitely continue to work for respondent and earn a comparable wage, or that the job provided is merely temporary in nature.

The Appeals Board adopts the findings and conclusions set forth by the Administrative Law Judge that are not inconsistent with those expressed herein.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated February 24, 1995, should be, and hereby is, affirmed.

**WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Gary L. Armstrong, and against the respondent/self-insured, Sedgwick County, for an accidental injury sustained on January 7, 1992, for a 2% permanent partial disability.

The claimant is entitled to 22.14 weeks temporary total disability at the rate of \$188.34 per week or \$4,169.85 followed by 12 weeks of temporary partial compensation

at \$93.77 per week or \$1,125.24 and 380.86 weeks of permanent partial disability compensation at \$3.77 per week or \$1,435.84 for a total award of \$6,730.93.

As of June 23, 1995, there would be due and owing to the claimant 22.14 weeks temporary total compensation at \$188.34 per week in the sum of \$4,169.85 and 12 weeks temporary partial compensation at \$93.77 in the sum of \$1,125.24 plus 146.29 weeks permanent partial compensation at \$3.77 per week in the sum of \$551.51 for a total due and owing of \$5,846.60 which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$884.33 shall be paid at \$3.77 per week for 234.57 weeks or until further order of the Director.

Pursuant to K.S.A. 44-536, the claimant's contract of employment with his counsel is hereby approved.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent to be paid direct as follows:

Barber & Associates	
Transcript of Regular Hearing	\$306.90
Deposition of Robert Rawcliffe, M.D.	129.20
Deposition of Robert Eyster, M.D.	100.50
<b>TOTAL</b>	<b>\$536.60</b>
 CRS Court Reporting Service	
Deposition of James Molski	<b>\$124.45</b>
 Ireland Court Reporting	
Deposition of Lawrence Blaty, M.D.	<b>\$338.60</b>

The Orders of the Administrative Law Judge that are not inconsistent with the above are hereby adopted by the Appeals Board as its own.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June, 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James P. Johnston, Wichita, Kansas  
E. L. Lee Kinch, Wichita, Kansas  
John D. Clark, Administrative Law Judge  
George Gomez, Director